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Supreme Court of the United States

OCTOBER TERM, 1966

No. 412

McFADDIN EXPRESS, INCORPORATED, L & L LEASING CORPORATION and LOUIS DeBERADINIS, JR.,

Petitioners,

—against—

THE ADLEY CORPORATION, MICHAEL L. ADLEY, DONALD A. ADLEY, RALPH J. ADLEY, DANIEL J. ADLEY and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1966

No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Introduction

The plaintiffs, McFaddin Express, Incorporated, L & L Leasing Corporation and Louis DeBeradinis, Jr., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 21, 1966.

Opinions Below

The opinion of the United States District Court for the District of Connecticut is unreported and appears at App. *infra,* p. A12. The opinion of the Court of Appeals has not yet been reported and appears at App. *infra,* p. A1.

Jurisdiction

The judgment of the Court of Appeals was entered on June 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The following questions are presented by the decision of the Court of Appeals:

1. Where a large motor carrier deliberately and without I.C.C. approval absorbed and destroyed a smaller motor carrier over which it had acquired temporary control, was there a violation of 49 U.S.C. §5?

2. Where there has been a violation of 49 U.S.C. §5 by the large carrier through the illegal combination which it worked, do the injured smaller carrier and its owners have a right of action to recover resulting damages against the large carrier by reason of that statutory violation?

3. Where there has been a deliberate and premeditated violation of 49 U.S.C. §310a, concerned with

temporary control of one motor carrier by another motor carrier pending an I.C.C. application for their merger, do the injured smaller carrier and its owners have a right of action to recover resulting damages against the large carrier by reason of that statutory violation?

4. Where there has been a violation of 49 U.S.C. §5 through an illegal combination of motor carriers, resulting in the destruction and absorption of one of those carriers, does an action for damages based on such violation come within the Federal jurisdiction under 28 U.S.C. §§ 1331(a) or 1337?

5. Where there has been a violation of 49 U.S.C. §310a, through a deliberate combination and disregard of the integrity of one of the carriers, does an action for damages based on such violation come within the Federal jurisdiction under 28 U.S.C. §§1331(a) or 1337?

Statement

1. *Nature of This Action.* This action was brought by McFaddin Express, Incorporated, L & L Leasing Corporation and Louis DeBeradinis, Jr. to enforce rights and recover damages under certain Federal statutes and orders of the Interstate Commerce Commission. The complaint relied in part on 49 U.S.C. §5 and on an I.C.C. order of May 15, 1964, which denied an application for the combination of McFaddin Express, Incorporated into The Adley Corporation.

After the complaint was filed and before filing an answer, the defendants made a motion to dismiss the

action for lack of Federal jurisdiction. There was no diversity of citizenship between the parties, and the defendants claimed that there was no Federal question on which to base jurisdiction. The District Court granted the motion. The Court of Appeals affirmed, in two opinions in which the majority and the concurring judges disagreed on the grounds and questions involved.

No pleading has been filed in the case by the defendants.

2. *The Facts.* The only pleading filed in this action is the complaint, and for purposes of the questions in issue the allegations in the complaint must be taken as factually true. *Bell* v. *Hood*, 327 U.S. 678, 681; *Fielding* v. *Allen*, 181 F. 2d 163, 166 (C.A. 2).

McFaddin Express, Incorporated (herein called "McFaddin") was a Connecticut corporation, doing business as a motor carrier of freight in interstate commerce, and subject to the Federal statutes regulating such business activities. The Adley Corporation (herein called "Adley") was a Connecticut corporation, also doing business as a motor carrier of freight in interstate commerce, and likewise subject to regulation by Federal statutes.

Adley was a giant motor carrier operating routes from the southern states, through the middle Atlantic and New England states, and into Canada. McFaddin was a much smaller carrier, operating principally in Connecticut and certain neighboring states. Although confronted with financial problems, McFaddin was a well-known carrier with a growing business and at-

tractive prospects. Its annual gross revenues were approaching $3,000,000; it had more than 5,000 customer accounts, including businesses of national prominence; it had operating equipment with a value of over $1,000,000; and it employed 270 persons. Moreover, McFaddin's geographical area of operations fell within Adley's larger area of operations, and McFaddin was a competitor of Adley within that common area.

Adley was engaged in an aggressive program of expansion, and was interested in acquiring McFaddin. Adley did not need McFaddin's franchise, since Adley was already authorized and equipped to operate in the areas of McFaddin's franchise. Adley's interest in McFaddin lay in adding McFaddin's business to that of Adley, through acquisition of McFaddin's customer accounts and good will, and Adley was also interested in certain personnel and equipment of McFaddin. Adley could manage the McFaddin business and use these McFaddin resources more economically and more profitably than was being done by the McFaddin management, to the point that Adley represented to the Interstate Commerce Commission, in seeking approval for the acquisition, that in a short period Adley could realize $500,000 net profit annually from the McFaddin business.

Beginning in November 1957, Adley tried to buy McFaddin, and pressed its efforts to acquire McFaddin for the next year and a half. Finally, in April 1959, Adley contracted to buy all the stock of McFaddin (and of the plaintiff L & L Leasing Corporation, whose sole function was to lease equipment to McFaddin).

Two contracts were executed at that time. One was a sale contract, for the sale to Adley of all the stock in McFaddin, and was conditioned on obtaining I.C.C. approval for the acquisition. The second contract was a management contract, which shifted complete and exclusive control of McFaddin to Adley pending the I.C.C. consideration of the sale contract. The management contract, thus providing for the shift in interim control, was also conditioned on I.C.C. approval.

Two applications were then promptly filed by Adley with the I.C.C. One sought approval for the ultimate acquisition of McFaddin by Adley, and the second sought approval for the temporary take-over of McFaddin by Adley. In both applications Adley represented that Adley's purpose and intent were the preservation and strengthening of McFaddin as a motor carrier. The I.C.C. granted approval for the temporary take-over of McFaddin by Adley in May 1959. The I.C.C. approval was granted with the express warning that it had no implications as to whether approval for the sale or acquisition would be granted, and Adley was required to preserve McFaddin as a carrier in substantially unchanged condition until the I.C.C. ruled on that acquisition or sale. Eventually, in May 1964, the I.C.C. denied approval for the acquisition of McFaddin by Adley and rejected the application filed on the sale contract.

However, in contravention of its representations and obligations, Adley absorbed McFaddin very soon after it got temporary control in May 1959. By May 1964, when the I.C.C. rejected the sale application, Adley had completely destroyed McFaddin as a

separate carrier, and there was not even a corporate shell to return to the former owner of McFaddin. In absorbing McFaddin, Adley unilaterally, and without I.C.C. approval, worked a de facto or practical combination of McFaddin into Adley. Adley thereby achieved its objective, notwithstanding the I.C.C. action to the contrary in May 1964 prohibiting the sale or acquisition. In so doing, Adley violated 49 USC §5, and breached the I.C.C. order of May 1964.

3. *The Prior Action.* In a prior action brought by these plaintiffs against these defendants, Federal jurisdiction was alleged on the basis of the I.C.C. order of temporary control of May 1959, which was alleged to have been breached, and on the existence of a Federal interest in the subject matter of the sales and management contracts between these parties. Federal jurisdiction on those grounds was denied by the Court of Appeals, and a petition to this Court for certiorari was denied. 346 F. 2d 424, petition for certiorari den. 34 U.S. Law Week 3266 (Feb. 1, 1966).

The Court of Appeals stated in its opinion in that case, however, that it did not consider whether Federal jurisdiction could be based on a violation of 49 U.S.C. §5, because that question was not presented by the prior complaint. 346 F. 2d at 426, n. 3.

The plaintiffs then brought this action, on a new complaint which presented for the first time alleged violations of 49 U.S.C. §5 and of the I.C.C. order of May 1964, and claimed for the first time the presence of Federal jurisdiction based on those violations.

The District Court dismissed this action on the ground that the questions of Federal jurisdiction,

raised by violations of 49 U.S.C. §5 and the I.C.C. order of May 1964, had been not only considered but also, decided against the plaintiffs by the Court of Appeals in the prior action. However, the Court of Appeals, in considering these questions of jurisdiction on their merits in the present action, rejected those grounds of the District Court. *Moore's Federal Practice, vol. 1B, par. 0.405 [5]; Smith* v. *McNeal,* 109 U.S. 426; *Fujii* v. *Dulles,* 259 F. 2d 866 (C.A. 9).

Reasons for Granting the Writ

The questions presented by this action involve matters of first impression concerning the regulation of motor carriers in interstate commerce; the consequences of the statutory prohibition against the combination of such carriers in violation of the statutory plan; the right of persons injured by such violations to bring action for the resulting damages; and the effect of such controversies on the presence of Federal jurisdiction. In considering these questions, in areas of first impression, the judges of the Court of Appeals were in disagreement, reflected by the majority and concurring opinions below.

1. Adley absorbed McFaddin, and destroyed it as a separate carrier. The effect was clearly a combination or merger of McFaddin into Adley to the same extent as if a formal corporate merger had been arranged. And it was done, not only without I.C.C. prior approval, but contrary to the I.C.C. order of May 1964. Adley's conduct was a sharp violation of the terms and intent of 49 U.S.C. §5.

The terms of §5 are of the broadest scope, and expressly prohibit any combination of carriers in any

manner and in any respect except upon the prior express approval of the I.C.C. obtained upon application by the carrier. These provisions, as they clearly apply here, are presented in the appendix annexed hereto. The judicial construction of these provisions has likewise recognized their extensive scope, sufficient by far to encompass the conduct of Adley in this case. *Gilbertville Trucking Co.* v. *U.S.*, 371 U.S. 115; *U.S.* v. *Marshall Transport Co.*, 322 U.S. 31; *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169.

The majority opinion in the Court below recognized that §5 is broad enough to apply to the conduct of Adley in this case, and that Adley's conduct could be a violation of §5. The concurring opinion, however, took the opposite position, that §5 could not be violated in this case because Adley's conduct occurred after an order of temporary control had been issued by the I.C.C. under 49 U.S.C. §310a. But it is conceded, on the present posture of this case, that Adley drastically departed from the §310a order, so that Adley acted outside the temporary shelter of §310a and came within the prohibition of §5. There is nothing in §5 that says that it does not apply or that it cannot be violated merely because some order under §310a has been issued, even though the permissible action under that §310a order has been clearly exceeded. Moreover, there was a further order of the I.C.C. here other than the §310a order. That was the order of the I.C.C. of May 1964, which denied approval for a combination of the carriers. The concurring opinion seems to ignore this order and the related I.C.C. determination that it would not authorize a combination of the carriers.

With respect to the conflict between the two opinions

below on this point, it is respectfully submitted that the majority was correct.

2. The majority opinion below takes the position that, notwithstanding the violation of §5 by Adley, there can be no right of action against Adley for damages caused by reason of that statutory violation. The concurring opinion below disagrees, stating at its outset that "the approach of the majority, holding that there can never be any private cause of action for violation by a motor carrier of Section 5 . . . is overly broad and contrary to sound principles of statutory interpretation." It is respectfully submitted that the concurring judge is correct in his position; that the majority position is contrary to the express terms of the statute and modifies the express statutory language without sufficient reason; and that the majority position unduly deprives injured parties of their right and opportunity to seek redress for the injuries caused by such statutory violations.

The statute, in 49 U.S.C. §8, expressly provides for a private action for damages against a carrier which violates any of the provisions of chapter 1 of 49 U.S.C. That chapter 1 includes §5, which Adley has violated. In addition, 49 U.S.C. §9 expressly provides for a suit for damages as an alternative to filing a complaint with the Commission, where a party claims to be damaged by a carrier, and §9 goes to considerable length to furnish procedural assistance to such an injured party in an action in the Federal courts. Furthermore, for purposes of these provisions there is a definition of "carrier" in 49 U.S.C. §5(13), which expressly includes "a motor carrier subject to chapter 8 of this title," so that it is clear that a motor carrier is subject to the restrictions of §5, and, on violating

those restrictions, has violated provisions of chapter 1, with the attendant right of private action provided in §§8 and 9. The express terms of these provisions therefore support the position of the concurring judge below that the statute itself confers a right of private action here.

The Federal courts have recognized a right of private action as an adjunct remedy for a statutory violation, even in the absence of the statutory basis which exists here. In appropriate instances the Federal courts will infer private rights from a Federal regulatory statute. *J. I. Case Co.* v. *Borak,* 377 U.S. 426; *Tunstall* v. *Brotherhood,* 323 U.S. 210. A right of private action was recognized in *Dann* v. *Studebaker,* 288 F. 2d 201, 208 (C.A. 9), where the particular regulatory provision did not expressly give a right of private action and notwithstanding the contrast that other provisions of the same statute did give rights of private action. See also *Roosevelt Field* v. *North Hempstead,* 84 F. Supp. 456, 459 (E.D.N.Y.); *Laughlin* v. *Riddle Aviation Co.,* 205 F. 2d 948 (C.A. 5); *Fitzgerald* v. *Pan American World Airways,* 229 F. 2d 499, 501 (C.A. 2); *Brown* v. *Bullock,* 294 F. 2d 415, (C.A. 2), affg. 194 F. Supp. 207 (S.D.N.Y.).

There is good reason for granting and recognizing a right of private action in such cases as this one. Adley has absorbed McFaddin and destroyed it as a business, integrating McFaddin's customers into Adley, taking the assets which it wanted and discarding others, and destroying the separate organization of McFaddin to the point where even its corporate existence was terminated. This is precisely the kind of misconduct at which the statute was aimed and which Congress wants to deter. Adley's action has made it

practically impossible to restore the *status quo ante,* and the principal recourse for the injured parties consists of an accounting and damages. In such a situation there is little that the I.C.C. either can or wants to do. The I.C.C. cannot restore the existence of McFaddin or compel the return of that business to its owner. That is not possible in these circumstances. And the I.C.C. would find itself in a difficult position to act for the injured parties in suing to recover damages for them. Indeed, the I.C.C. customarily refuses to take action in such cases and refers the parties to the courts. For real relief for injury caused by a violation of these Federal statutes, the injured parties must have recourse to a private action for damages.

The effect of the decision below is to emasculate a basic protection within the statutory scheme which a carrier has both as a deterrent against illegal action which breaches the statute and as a means of making itself whole after illegal action. The private action for damages, in a Federal forum with the procedural aids which Congress has provided in §§8 and 9, is an important element in the enforcement of the regulatory pattern which Congress has enacted. The legislative objective, prohibiting unauthorized combinations and directing the preservation of the independence of carriers, is evident in both §§5 and 310a, and the private action in the Federal forum, brought for violations of either of these regulatory provisions, is an important incident for attaining the legislative purpose.

To deny the right of private action, under these regulatory provisions relating to the merger or absorption of motor carriers, represents a serious curtailment of individual and property rights. Those rights are not adequately protected by making the

I.C.C. the sole medium of action. In addition to the reasons mentioned, the disinterest or apathy of the I.C.C. has become the subject of comment. A prominent authority on the administrative process has observed that "One of the greatest dangers in the administrative process is that an administrative agency through lethargy or through immoderate yielding to the influence of the regulated groups may thwart the democratic will by acting only when prodded by private interest. * * * An outstanding example of administrative old age is that patriarch of agencies, the Interstate Commerce Commission." *Davis, vol. 1, Administrative Law Treatise 4.08 (1958).* This comment is particularly pertinent where, as in the present case, a small carrier is aligned against an influential giant. In view of all the circumstances and considerations, there is not sufficient ground, in the face of the express words of Congress, to infer that Congress intended in such a case to infringe private rights by curtailing private action.

This case therefore involves serious questions relating to individual and property rights of injured parties, and the scope and effect of the Federal statutes regulating motor carriers in interstate commerce. The judges of the Court of Appeals were in disagreement on these questions. It is respectfully submitted that the authoritative resolution of this Court is needed.

3. Federal jurisdiction in this case was founded on the existence of a Federal question under 28 U.S.C. §1331(a) or 1337. The plaintiffs claim that Adley destroyed and absorbed another independent carrier in interstate commerce. Congress, with the purpose

of preserving such a carrier and protecting the system of interstate motor carriage of freight, has prohibited in §5 and in §310a what Adley has done. Adley's conduct strikes at a vital segment of the Federal system of motor carrier regulation. Such a controversy clearly raises a Federal question to be adjudicated by the Federal courts. The decision below rejects Federal authority without justification, relying on speculative refinement which discounts the basic character of the controversy, the action of Congress in this area, and the need for private action and the recognition of it by Congress. The concurring judge pointed out that "strong reasons should exist before a court refuses to exercise jurisdiction granted to it." Such reasons do not exist here. By rejecting Federal jurisdiction, the decision below not only undermines private rights and the position of a carrier, but puts in doubt the authority of the Federal courts where their jurisdiction depends on a Federal question. That doubt in this important area, it is respectfully submitted, should be clarified by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statutes Involved

I. Title 49, United States Code,

§5. Combinations and Consolidations of Carriers:

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and, in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid, each day of its continuance shall be a separate offense * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock

or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

* * * *

(2) (b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. * * *

* * * *

(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or

management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances

surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

* * * * *

(10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are motor carriers subject to chapter 8 of this title (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(3) of this title), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to chapter 8 of this title, does not exceed twenty. * * *

* * * * *

(13) As used in paragraphs (2)-(12) of this section, inclusive, the term "carrier" means a carrier by railroad and an express company and a sleeping-car company, subject to this chapter; and a motor carrier subject to chapted 8 of this title; and a water carrier subject to chapter 12 of this title.

II. Title 49, United States Code,

§8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

III. Title 49, United States Code,

§9. Remedies of persons damaged; election; witnesses

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action

brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. Feb. 4, 1887, c. 104 Pt. I, §9, 24 Stat. 382; Mar 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 9, 1935, c. 498, §1, 49 Stat. 543.

IV. Title 28, United States Code,

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

§1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 351—September Term, 1965.

(Argued May 4, 1966 Decided June 21, 1966.)

Docket No. 30219

MCFADDIN EXPRESS, INCORPORATED, L & L LEASING CORPORATION and LOUIS DEBERADINIS, JR.,

Plaintiffs-Appellants,

—v.—

THE ADLEY CORPORATION, MICHAEL L. ADLEY, DONALD A. ADLEY, RALPH J. ADLEY, DANIEL J. ADLEY, and UNITED STATES OF AMERICA,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
MOORE and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the District Court for Connecticut, M. Joseph Blumenfeld, *Judge,* dismissing, for want of federal jurisdiction, a second complaint for alleged injuries to an interstate motor

carrier and its stockholders by another motor carrier. See 346 F. 2d 424. Affirmed.

TOBIAS WEISS, Stamford, Conn., *for Plaintiffs-Appellants.*

JOSEPH P. COONEY, Hartford, Conn. (Patrick J. Flaherty, of Counsel), *for Defendants-Appellees Adley.*

FRIENDLY, *Circuit Judge*:

Plaintiffs, an interstate motor carrier and its stockholders, appeal from a judgment of the District Court for Connecticut dismissing for want of federal jurisdiction their complaint for injuries alleged to have been inflicted by another carrier under a management contract pending an unsuccessful application to the Interstate Commerce Commission for approval of the purchase. The case is a sequel to our decision upholding similar dismissal of a prior complaint, 346 F. 2d 424 (2 Cir. 1965); the Supreme Court denied certiorari, —— U. S. —— (1966), after having received a memorandum from the Solicitor General submitted in response to the Court's invitation for an expression of the views of the United States. The complaint now before us seeks to raise the question mooted in a footnote to our earlier opinion:

> "3. McFaddin does not suggest that §5 had been violated, or that its present injuries would be compensable on that theory, and we do not consider the question." 346 F. 2d at 426.

Meanwhile McFaddin has protected itself by filing timely suit in a Connecticut court.

The additional claim advanced by the new complaint is that Adley, the defendant carrier, exceeded the temporary authority granted by the Commission under §210a(b) of the Interstate Commerce Act "to control McFaddin Express, Inc., through management . . . upon the terms and conditions set forth in the agreement filed with the application" by going beyond the agreement and taking action which in practical terms absorbed McFaddin into Adley and destroyed McFaddin as a separate carrier. This, say the plaintiffs, was a violation of §5(4), and, under what has become familiar doctrine, gives rise to a private claim on their part arising under a law of the United States. See 346 F. 2d at 426-27; ALI, Study of the Division of Jurisdiction Between State and Federal Courts 55-58 (Tent. Draft No. 4, 1966).

Although impressive as thus stated, the argument must fail—for a reason not adverted to by the parties. When it enacted the Motor Carrier Act, Chapter 8 and Part II of the Interstate Commerce Act, 49 Stat. 543 (1935), Congress omitted any provisions comparable to §§8 and 9 of Chapter 1 which make common carriers subject to that chapter liable for damages for any violation and give injured parties not only the remedy of submitting a complaint to the ICC, see §§204(c), 222(b), but that of bringing suit in federal court. A letter from the Legislative Committee of the Commission to the Chairman of the Senate Committee on Interstate and Foreign Commerce in connection with an amendment proposed by the Commission in

1949 demonstrates that the omission was not inadvertent:

> "When part II of the act was enacted as the 'Motor Carrier Act, 1935,' it was believed that conditions were not stabilized and that the subjection of motor carriers to liability for damages should be deferred until the difficult initial problems in connection with the new regulation of those carriers had been more clearly worked out."
>
> Hearings before Sen. Comm. on Interstate and Foreign Commerce on S. 1194, 80th Cong., 2d Sess., p. 12.

By contrast the Water Carrier Act, enacted in 1940 as Part III, contained provisions generally conferring a private right of action which were obviously modeled on §§8 and 9 of Chapter 1, see §§308(b) and (c). In *Consolidated Freightways, Inc* v. *United Truck Lines, Inc.,* 216 F. 2d 548 (9 Cir. 1954), cert. denied, 349 U. S. 905 (1955), where the plaintiff sought money damages against a motor carrier for infringing on rights accorded by its certificate, the court invoked *expressio unius* to reject the argument that a private remedy for violating the Motor Carrier Act could be inferred despite the absence of statutory provision; it declared that "Congress intended regulatory controls to be exercised by the Commission and not by or through individuals." 216 F. 2d at 547. In subsequent state court litigation, the Supreme Court of Oregon took the same position, 330 P. 2d 522 (1958), cert. denied, 359 U. S. 1001 (1959). A private remedy was also held to be lacking with respect to reparations from

motor carriers for unreasonable or discriminatory rates. *T. I. M. E. Inc.* v. *United States,* 359 U.S. 464 (1959). In a preliminary phase of *Riss & Co.* v. *Association of American Railroads,* 178 F. Supp. 438 (D. D. C. 1959), the court relied on the absence of provisions like §§8 and 9 in the Motor Carrier Act not only to bar counterclaims for operations by the plaintiff allegedly exceeding its certificate, as in *Consolidated Freightways,* but also for competitive injury from control alleged to be in violation of §5(4).

It can be argued that this holding was in error since a motor carrier's subjection to §5(4) since 1940 has stemmed not from anything in the Motor Carrier Act but from §5(13) defining motor carriers as within the term "carrier" as used in paragraphs (2)-(12) of the section; hence it can be said with verbal accuracy that violation of §5(4) by a motor carrier is a violation by "a carrier subject to the provisions of this chapter" within the terms of §§8 and 9. If the question had arisen before the 1965 amendments to the Motor Carrier Act, 79 Stat. 648, this argument would have been rather easily answered. Initially the provisions requiring I. C. C. approval of acquisitions by a motor carrier were in the Motor Carrier Act itself, §213, and these, like the provisions with respect to the licensing of operations, §222(b), were enforceable only by the Commission. See 49 Stat. 555-56, 564. The repeal of old §213 and inclusion of motor carriers in §5 were part of the 1940 legislation establishing a National Transportation Policy, 54 Stat. 899, and adopting Part III of the Interstate Commerce Act relating to water carriers. The desire of the draftsman to have a single comprehensive provision relating to

consolidation of all three forms of transportation rather than being obliged to frame separate sections for each Part of the Interstate Commerce Act would not suggest any legislative purpose to provide a private remedy for unlawful control by a motor carrier that had previously been withheld. See Sen. Rep. No. 433, 76th Cong., 1st Sess. 28 (1939); H. R. Rep. No. 2016 at 61, and H. R. Rep. No. 2832 at 68, 76th Cong., 3d Sess. 68 (1940). Indeed, in view of the legislative concern over too much competition in the motor carrier industry and the need for effective limitations, see *McLean Trucking Co.* v. *United States, supra,* 321 U. S. at 83-84 & n. 17; *American Trucking Assns.* v. *United States,* 344 U. S. 298, 312-13 (1953); Historical Development of Transport Coordination and Integration in the United States, ICC Bureau of Transport Economics and statistics, Statement No. 5015, at 92-95 (1950), quoted in Auerbach & Nathanson, Federal Regulation of Transportation 26-28 (1953), it would have been a strange reading to say that by the 1940 amendment Congress provided a private right of action for unlawful combination although it refused in 1949 and again in 1957, see *T. I. M. E. Inc., supra,* 359 U. S. at 471-73, to provide one against unlicensed operation or to give shippers by motor carrier a cause of action for unreasonable or discriminatory rates.

Today, however, the question is considerably closer. By the Act of September 6, 1965, 79 Stat. 648, effective ninety days thereafter,[1] Congress amended

[1] Although the complaint here was filed on July 26, 1965, and judgment of dismissal was entered November 2, we deem it best to consider the case on the basis of existing law.

§204(a) to grant a right to reparation for unreasonable or discriminatory charges by motor carriers, and added a new section, 222(b)(2), giving a private right of action to enjoin "clear and patent violation" of the licensing requirements. See 1965 U. S. Code Cong. & Ad. News 2923, 2930-31. The argument as to the absurdity of reading §5(13) as conferring a private right of action against a motor carrier for violation of §5(4) when no such right existed for even more consequential provisions thus loses part of its force; now, it can be said with some plausibility, the tables are turned and it would be strange that §5(4) should be enforceable against a motor carrier only by the Commission when private rights of action exist in respect of rates and, in some degree, unlicensed operation. On the other hand, if, as we think clear, no private right of action for violation of §5(4) by a motor carrier existed prior to 1965, we ought not to assume a desire to change this in the absence of some indication of Congressional intent, and neither the language of the 1965 amendment nor the legislative history affords this. The Commission and the committee reports justified the reparations amendment as correcting what was thought to be an erroneous decision in the *T. I. M. E.* case, and as avoiding the added complexities introduced by *Hewitt-Robbins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84 (1962), see 1965 U. S. Code Cong. & Ad. News, *supra*, 2931, 2936-39; the private action for unlicensed operations was "to afford injured parties a measure of self-protection against operations which are openly and obviously unlawful." The committees emphasized the limited character of the latter grant; "the words

'clear and patient' are used and are intended as a standard of jurisdiction rather than as a measure of the required burden of proof." See 1965 U. S. Code Cong. & Ad. News, 2931, 2943. But Congress still declined to place in the Motor Carrier Act any provisions like §§8 and 9 or 308(b) and (c), generally giving a private right of action. With the legislature so cautious in granting a limited private right of action against an admitted evil, it is hard to conclude that Congress meant to bestow an unlimited one in a complex and debatable area as to which there had been no complaint. Pending further explication of legislative purpose, it thus seems best to continue to read §§8 and 9 in a manner which accords equally well with the language, namely, that these sections concern only violations of Chapter 1 by carriers generally subject to its provisions, to wit, those, primarily railroads, to which §1(1)) says "the provisions of this chapter shall apply." Hence, in the absence of provision in Title II, no private right of action against a motor carrier for violation of §5(4) exists.

All that remains of the additional claim now pleaded is that Adley violated the management contract. Nothing in the complaint indicates that determination whether it breached this agreement will require construction of the Interstate Commerce Act. Contrast *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950). Although, as recognized in our prior opinion, there is doubtless a federal policy "that a carrier authorized to exercise temporary control will use this permission in accordance with its agreement, so as to enable the controlled carrier to resume independent operation if approval under §5 is ultimately

denied," 346 F. 2d at 426, the infusing of the agreement with this policy is not enough, standing alone, to cause an action for breach of the contract to constitute a federal claim. See *Pan American Petroleum Corp.* v. *Superior Court,* 366 U. S. 656, 663-64 (1961). The contrary result in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957), rested not merely on the federal interest in collective bargaining agreements in interstate commerce but upon the jurisdictional grant in §301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156. See 353 U.S. at 450-52. Here not only is there no analogue in the Motor Carrier Act to §301(a) but, on our reading, Congress withheld a private remedy for violation of the statute itself. It would thus be highly unlikely that Congress meant that acts by an acquiring motor carrier toward the carrier to be acquired, allegedly in excess of its contract rights, should give rise to a claim under the laws of the United States, 28 U. S. C. §1331, or "under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies," 28 U. S. C. §1337.

Affirmed.

LUMBARD, *Chief Judge* (concurring):

I concur in the result.

I think the approach of the majority, holding that there can never be any private cause of action for violation by a motor carrier of Section 5 of the Interstate Commerce Act, 49 U. S. C. §5, is overly broad and contrary to sound principles of statutory interpreta-

tion. I think dismissal is appropriate, however, because in this case the ICC granted an exemption from §5 pursuant to §310a; interpreting the complaint, therefore, as alleging a violation of the limited authority granted by such approval, I do not find any statutory private right of action for such a suit.

Congress explicitly gave a private party a right of action in §§8 and 9 for violations of §5 by carriers regulated by that section. Under §5(13) such carriers include motor carriers as well as railroads and water carriers. Strong reasons should exist before a court refuses to exercise jurisdiction granted to it. A possible inadvertence in conferring the power should not be considered sufficient reason to ignore the plain meaning of the statute unless it is in clear conflict with other, more transcendent, congressional policies.

Even before the recent amendments to the Motor Carrier Act it could have been argued that the refusal to grant a private right of action for unlawful operation in excess of a certificate, where the injury is to other regulated carriers and in which the Commission's interest is strong, did not conflict with granting a private remedy for unlawful combination, where the injury may be to minority stockholders. In light of the Act of September 6, 1965, 79 Stat. 648, creating a limited remedy for operation without a certificate, there remains no basis for finding that the application of §§8 and 9 to violations of §5 by a motor carrier is sufficiently "incongruous" with the Motor Carrier Act to warrant ignoring the statutory grant of a right of action. I think a district court has jurisdiction to hear a private party claim that he has been injured by an unlawful combination.

But in this case the ICC granted temporary approval to the combination under §310a. McFaddin asserts that the immunity which that creates is lost because Adley exceeded the control authorized by the Commission due to its violation of the management contract. But §5 is not a forfeiture provision to enforce compliance with the details of orders under §310a, as plaintiff seems to suggest; it expresses a substantive policy against unauthorized increases in effective control by one carrier over another. Once the Commission has authorized temporary control I think it lies with the Commission first to determine whether the alleged operation exceeds the actual control which it contemplated granting. If, upon investigation, it discovers that the control is excessive, it has ample authority to correct the abuse, §§5(7), 304(c), or it may find that the additional control is useful and necessary and so approve the practice.

Although an ultimate consequence of any unauthorized increase in control is a violation of §5, it is apparent that the plaintiff's federal claim must turn upon whether the defendant's actions violated the Commission's order under §310a. There is, however, no statutory basis for a private right of action in the courts for a violation of orders under §310a; and in light of the Commission's paramount concern with the scope of control exercised in such a situation and its wide range of discretion I do not think any should be implied.

I therefore concur in the dismissal for want of federal jurisdiction.

Opinion of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 11,047

[SAME TITLE]

This is a second suit between the same parties in which the plaintiffs again seek an accounting and damages for the alleged mismanagement of the plaintiffs' business while the defendants operated that business under a grant of temporary approval to so operate obtained from the ICC as required by 49 U.S.C. § 310a(b). The case is not different from the first one. The same orders of the ICC, the same contract between the parties, the same conduct by the defendants, and the same injuries to the plaintiffs are alleged. The first case was dismissed specifically for lack of federal question jurisdiction, 240 F. Supp. 791 (1965), and affirmed by the Court of Appeals, 346 F. 2d 424 (1965).[1]

Not content to await the action of the Supreme Court upon their petition for certiorari, the plaintiffs now purport to present what they contend is a new jurisdictional ground intimating that it was suggested in Judge Friendly's affirming opinion. The specific quote that the plaintiffs rely on is where Judge Friendly explained:

---

[1] Petition for cert. filed, 34 U.S.L. Week 3077 (Aug. 24, 1965) (No. 492).

"The [ICC] order is permissive only, in effect granting a temporary exemption from the prohibition of 49 U.S.C. § 5. If Adley had never assumed the permitted temporary control, it would have violated its contract but not the order. And if Adley did control McFaddin other than 'upon the terms and conditions set forth in the agreement filed with the application,' perhaps Adley forfeited its exemption from § 5[3], but again it disobeyed no express command of the ICC."

"[3] McFaddin does not suggest that § 5 has been violated or that its present injuries would be compensable on that theory, and we do not consider the question." (346 F.2d at 426)

In the present complaint, the plaintiffs allege with commendable frankness: "The position of the plaintiffs is that the conclusion of the Court of Appeals for the Second Circuit, that such violation of 49 U.S.C. Sec. 5 is not suggested or asserted in the complaint heretofore filed by these plaintiffs against these defendants in the United States District Court for Connecticut, is respectfully considered to be erroneous, but this complaint is being filed in the event that [the] conclusion of the Court of Appeals remains the law of that case."

For this court not only is *McFaddin Express, Inc.* v. *Adley Corp.*, 240 F. Supp. 791, the law of the case, it is also bound to follow 346 F.2d 424, the affirming decision of the Court of Appeals. *United States* v. *Wainer*, 240 F.2d 595 (7th Cir.), *cert. denied*, 355 U.S. 815, 78 S.Ct. 15, 2 L. Ed. 2d 32 (1957). The day

has long passed when the Court of Appeals for this Circuit will affirm the dismissal of a claim because it is inartistically or insufficiently stated, *Dioguardi* v. *Durning,* 139 F.2d 774 (2d Cir. 1944), or confusedly based on an incorrect legal theory. *Gins* v. *Mauser Plumbing Supply Co.,* 148 F.2d 974 (2d Cir. 1945). I reject the plaintiffs' contention that Judge Friendly's footnote implied that an allegation that 49 U.S.C. § 5 was violated would have supported federal jurisdiction in this case. By leaving open the question, whether injuries attributable to a violation of § 5 are compensable, against the possibility that such a case might arise in the future, the footnote serves to emphasize that a § 5 violation did not here exist, not that it had not been pleaded. The new allegation in conclusory language that the authorized operation by Adley violated § 5 because it created an actual or *de facto* merger is nothing more than an insupportable gloss on the mosaic from 133 paragraphs in the plaintiffs' 33 page complaint, not the introduction of some crucial element whose omission was noted by the Court of Appeals. Had it been otherwise, the Second Circuit's disposition of the appeal would not have been an affirmance of the judgment of dismissal. It is the normal practice to remand with leave to amend where facts alleged would support federal jurisdiction on a discernible theory not asserted by a plaintiff. Cf. *Kerr* v. *Compagnie de Ultramar,* 250 F.2d 860 (2d Cir. 1958); *Allstate Ins. Co.* v. *Lumbermens Mut. Cas. Co.,* 204 F. Supp. 83 (D. Conn. 1962). A remand with leave to amend is a regular technique of judicial economy. See *Foman* v. *Davis,* 371 U.S. 178, 83 S.Ct. 227,

9 L. Ed. 2d. 222 (1962); *Klebanow* v. *New York Produce Exchange,* 344 F.2d 294 (2d Cir. 1965).

The substance of the jurisdictional basis of this action is the same. This is the same case. It may not be relitigated in this proceeding.

The motion to dismiss for lack of jurisdiction should be granted.

SO ORDERED.

Dated at Hartford, Connecticut, this 28th day of October, 1965.

M. JOSEPH BLUMENFELD
United States District Judge

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of June one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY, *Circuit Judges.*

MCFADDIN EXPRESS, INC., L & L LEASING CORPORATION & LOUIS DEBERADINIS, JR.,
Plaintiffs-Appellants,

v.

THE ADLEY CORPORATION, MICHAEL L. ADLEY, DONALD A. ADLEY, RALPH J. ADLEY, DANIEL J. ADLEY, and UNITED STATES OF AMERICA,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Judgment of District Court

[SAME TITLE]

This action came on for hearing before the Court, Honorable M. Joseph Blumenfeld, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that this case is dismissed for lack of jurisdiction and that defendants recover their costs of action.

Dated at New Haven, Connecticut, this 2nd day of November, 1965.

[SEAL] GILBERT C. EARL
Clerk of Court

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 412

McFADDIN EXPRESS, INCORPORATED, L & L LEASING CORPORATION and LOUIS DeBERADINIS, JR.,
Petitioners,

—against—

THE ADLEY CORPORATION, MICHAEL L. ADLEY, DONALD A. ADLEY, RALPH J. ADLEY and DANIEL J. ADLEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 412

McFADDIN EXPRESS, INCORPORATED, L & L LEASING CORPORATION and LOUIS DeBERADINIS, JR.,

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—against—

THE ADLEY CORPORATION, MICHAEL L. ADLEY, DONALD A. ADLEY, RALPH J. ADLEY and DANIEL J. ADLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Introduction

The respondents, The Adley Corporation, Michael L. Adley, Donald A. Adley, Ralph J. Adley and Daniel J. Adley, oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 21, 1966.

Opinions Below

The opinion of the United States District Court for the District of Connecticut (App. Petitioner's Brief,

p. A12), is unreported. The opinion of the Court of Appeals (App. Petitioner's Brief, p. A1), is reported at — F.2d —.

Jurisdiction

The judgment of the Court of Appeals was entered on June 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The questions presented by the petition for certiorari are:

1. Whether an order allowing temporary management under 49 U.S.C. § 310a resulted in an exemption from the prohibition of 49 U.S.C. § 5?

2. Whether the Motor Carrier Act grants a private right of action or whether one should be implied under the circumstances of this case?

3. Whether a construction of the Interstate Commerce Act is required here or does state law govern the claims?

4. Whether in these circumstances this proceeding is barred by the earlier judgment under the doctrine of *res judicata*?

5. Whether an alleged violation of 49 U.S.C. § 5 by a motor carrier furnishes the basis of federal question jurisdiction?

Statement

The complaint alleged the making of two contracts as of April 20, 1959, relating to McFaddin Express, Inc., a motor carrier holding a certificate from the Interstate Commerce Commission, and L & L Leasing Corporation which leased equipment to it. The first contract, (Exhibit C attached to the petitioners' complaint), provided for the sale of all of the stock of the two corporations to The Adley Corporation (formerly The Adley Express Company), also a certified motor carrier. The purchase price was $125,000 (Ex. C, par. 3). This purchase price was to be reduced by the amount of any decrease in the net worth of the companies which was shown on Schedule A attached to the contract, (showing that liabilities exceeded assets by $230,263.52) which was warranted to be a correct statement of the condition of the companies (Ex. C, par. 2.2). Any decrease was to be determined by two certified audits, the first as of December 31, 1958, and the second as of the future date that Adley assumed temporary management of the companies in accordance with ICC authorization (Ex. C, par. 3).

The second contract provided for temporary management and control (Ex. E attached to the complaint). It provided that it should continue "for a period of 180 days from the effective date of any order of the Commission authorizing the same, or to such earlier or later date as shall be ordered by said Commission, and unless otherwise ordered by said Commission until a final order is made by said Commission disposing of the third party's application for authority to acquire through ownership of capital stock control of the First Parties" (Ex. E, par. 5).

The contract of sale was subject to ICC approval of the management contract in accordance with 49 U.S.C. § 310a(b) and ultimate approval of the sale itself as required by 49 U.S.C. § 5. Appropriate applications were made to the ICC. On May 21, 1959, the Commission by order granted the application under § 310a(b) stating in part: "The Adley Express Company be, and it is hereby, authorized to control McFaddin Express, Inc. through management for a period not exceeding 180 days, beginning with the date hereof, unless otherwise ordered, upon the terms and conditions set forth in the agreement filed with the application." (Ex. A, par. 4) This order was later extended.

Serious disagreements occurred between the parties concerning, among other things, the accuracy of the guaranteed balance sheet dated December 31, 1958 and the respondents' claim that the subsequent audits disclosed a substantial decrease in the net worth far exceeding the agreed purchase price of $125,000. The Federal Government instituted suit on October 20, 1960, for foreclosure of tax liens aggregating $198,079.40 on McFaddin's franchise and other property, and when a judgment of foreclosure was entered on November 28, 1961, McFaddin's franchise was sold. *United States* v. *McFaddin Express, Inc.*, 310 F.2d 799, 800 (2d Cir. 1962). McFaddin's service thereupon became largely dormant.

On two separate occasions in 1961 and 1963, the ICC denied approval of the acquisition. Although Adley first sought denial of the application for approval, it later urged approval to avoid litigation. *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 425 n.1 (2d Cir. 1965). The Commission in a final ac-

tion on May 15, 1964, denied approval. (Ex. B). It earlier stated that the disputes between the parties "are not matters requiring resolution by us . . . This long standing controversy is, as was stated in the prior report, a matter for the courts to decide if the parties cannot otherwise resolve the controverted matter." 93 M.C.C. 378, 382. The management contract terminated in August of 1964.

A prior action, also claiming more than $5,000,000 damages, was brought by the present plaintiffs against the present defendants on December 14, 1964, by a complaint containing five counts, 133 paragraphs and twelve prayers for relief. The plaintiffs sought enforcement of an "order" of the Interstate Commerce Commission dated May 21, 1959, authorizing temporary management under 49 U.S.C. § 310a(b), and also claimed damages for violation of that order. They also claimed damages for violation of various sections of the Interstate Commerce Act. That action was dismissed specifically for lack of federal question jurisdiction, without prejudice to its being brought in an appropriate forum. *McFaddin Express, Inc.* v. *Adley Corp.*, 240 F. Supp. 491 (D. Conn. 1965), affirmed, 346 F.2d 424 (2d Cir. 1965), certiorari denied, 382 U.S. 1026.

Before filing their first petition for a writ of certiorari on August 24, 1965, the plaintiffs instituted an identical action on July 12, 1965, in the Superior Court of Connecticut, (*McFaddin Express, Incorporated, et al.* v. *The Adley Corporation, et al.*, No. 8503, Fairfield County at Stamford), which is now pending.*

* Judge Blumenfeld in the District Court, before dismissing the first action, had granted a temporary restraining order against

Also, before filing their first petition for certiorari, on July 25, 1965, the petitioners instituted the present action in the United States District Court for Connecticut which was dismissed by Judge Blumenfeld for lack of jurisdiction on October 28, 1965. (App. Petitioners' Br. p. A12)

The Second Circuit dismissed the appeal for lack of jurisdiction. (App. Petitioners' Br. p. A1) Judge Friendly's opinion did not discuss whether the ICC order permitting operation under 49 U.S.C. § 310a granted an exemption from 49 U.S.C. § 5 but held that in any event no private right of action for violation of 49 U.S.C. § 5(4) existed. *McFaddin Express, Inc.* v. *Adley Corp.*, — F.2d —, (2d Cir. 1966). Judge Lumbard, concurring in the result, held that dismissal was appropriate "because in this case the ICC granted an exemption from § 5 pursuant to § 310a . . . ." He interpreted the complaint therefore "as alleging a violation of the limited authority granted by such approval", and found no statutory private right of action for such a suit. Id. at —. If either of the views of the members of the court is sound, certiorari should be denied.

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attachment under Rule 65(b) F.R.C.P. which the respondents sought on the ground of excessive and harassing attachment and refusal to accept a reasonable bond. Upon the dismissal of the first District Court action the respondents instituted a State Court action and secured an injunction against attachment without prior opportunity to post bond. The petitioners' attempt to have this action dismissed was denied by the Superior Court and the Supreme Court of Connecticut dismissed petitioners' appeal. 213 A.2d 312. This action is still pending in the Superior Court for New Haven County.

ARGUMENT

I

The order of the ICC under 49 U.S.C. § 310a granted an exemption from the prohibition of 49 U.S.C. § 5.

As Judge Friendly for the Second Circuit pointed out in the first decision, the order of the ICC "authorized" Adley to manage and control the plaintiff corporation in accordance with the terms of their contract. The Court said:

> "The order is permissive only, in effect granting a temporary exemption from the prohibition of 49 U.S.C. § 5. If Adley had never assumed the permitted temporary control it would have violated its contract but not the order. And if Adley did control McFaddin other than upon the terms and conditions set forth in the agreement filed with the application, perhaps Adley forfeited its exemption from § 5, but again it has disobeyed no express command of the ICC. Doubtless the commission does expect that a carrier authorized to exercise temporary control will use this permission in accordance with its agreement, so as to enable the controlled carrier to resume independent operation if approval under § 5 is ultimately denied. But we do not feel justified in reading the bland language of the order so that these expectations become ICC commands, especially when the commission has been at such pains to make clear that it considers the private disagreements of the parties not to be its concern. . . ." *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965), certiorari denied, 382 U.S. 1026.

Judge Lumbard was a member of the panel on each appeal. In the second appeal, Judge Lumbard's concurring opinion again points out: "I think dismissal is appropriate, however, because in this case the ICC granted an exemption from § 5 pursuant to § 310a; interpreting the complaint, therefore, as alleging a violation of the limited authority granted by such approval, I do not find any statutory private right of action for such a suit." *McFaddin Express, Incorporated* v. *Adley Corporation*, — F2d —, ———— (2d Cir. 1966). It is true that in the second appeal Judge Friendly did not reiterate his views as to the effect of an order under 49 U.S.C. § 310a —— it was hardly necessary to do so—but he held that in any event there was no private right of action for damages created for violation of 49 U.S.C., § 5.

Inasmuch as Judge Friendly in the second decision found no occasion to change his prior holding and Judge Lumbard's opinion reaffirms the holding of the first decision, both decisions are consistent in holding that no private right of action arises under 49 U.S.C. § 5 in view of the exemption granted by 49 U.S.C. § 310a.

II

The Motor Carrier Act does not grant a private right of action and none should be implied.

Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301-327, known as the Motor Carrier Act, contains no provision granting private parties a right to bring suit for claimed violations of its provisions allegedly resulting in the unlawful control of one motor carrier

by another. The conspicuous absence of such a provision is significant in light of the fact that Congress has provided private remedies for certain violations of other parts of the Interstate Commerce Act. 49 U.S.C. §§ 8, 9.

The Motor Carrier Act does provide, however, in 49 U.S.C. § 322 (b), that the Commission may apply to any district court of the United States to enforce provisions of that chapter. The fact that Congress omitted a provision for a private right of action to enforce alleged violations of the chapter is explained when the bill which became the Motor Carrier Act of 1935 is compared to the bill as introduced in 1934. The Rayburn Bill, HR 6836, 73d Cong., 2d Sess., contained a provision in § 17 (b) (now § 322 (b)) allowing not only the Commission but "any party injured" to apply to the district court for relief from violations of the chapter. The language "or any party injured" was left out of the final act. Subsequently, in 1954 HR 8238, 83d Cong., 2d Sess. was introduced to amend 49 U.S.C. § 322 (b) by adding after the word Commission the words, "or any motor carrier which is being, or will be injured by such violation." This bill was not enacted.

The absence, therefore, of a provision conferring a right of action on private parties to enforce provisions of the Motor Carrier Act is not accidental, but evidence of Congressional intent to withhold such a right of action from private parties and to leave enforcement to the Interstate Commerce Commission.

The cases in which the courts have provided remedies to effectuate Congressional intent are inapposite

here. In *J.I. Case Co.* v. *Borak,* 377 U.S. 426, this Court held that § 27 of the Securities Exchange Act authorized a federal cause of action for damages by a private party for an alleged violation of § 14 (a) of the Act relating to proxies. Even though the Act contained no specific provision for a private right of action, it did condemn as unlawful the practices alleged in the complaint. Thus, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Id. at 433. *Bell* v. *Hood,* 327 U.S. 678, 684.

Here, the Motor Carrier Act does not in terms provide a general right to sue for alleged violations thereof. Congress has refused to provide such a right. As stated in the Solicitor General's Memorandum (p. 6) in the prior petition for certiorari, No. 492, October Term, 1965, 382 U.S. 912, "a federal damages remedy here would largely duplicate the State remedy of a suit for breach of the management agreement and that neither the language nor legislative history of § 310a (b) affirmatively discloses an intent to protect persons harmed by the breach of such agreements."

The absence of a federal damages remedy in the Motor Carrier Act was determinative in *Consolidated Freightways, Inc.* v. *United Truck Lines, Inc.,* 216 F.2d 543 (9th Cir. 1954), certiorari denied, 349 U.S. 905. In a suit for money damages, the plaintiff, a certified motor carrier, claimed that the defendant violated the Motor Carrier Act by operating without an ICC certificate, and that the federal court had jurisdiction to infer a private remedy. The court refused to infer a private remedy and stated that:

> "Part II makes provision only for criminal penalties and injunctive remedies to be sought by the Commission. In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as a wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself." Id. at 545.

The recent amendments to the Motor Carrier Act, Act of September 6, 1965, 79 Stat. 648, provide a private right of action limited to recovery for unreasonable and discriminatory charges by motor carriers and to enjoin "clear and patent violation" of the licensing requirements. 1965 U.S. Code Cong. & Ad. News 2923, 2930-31. The instant case does not fall within either of the exceptions created by Congress. In denying a private right of action in this case based upon the Act as amended, the court below stated that: "With the legislature so cautious in granting a limited private right of action against an admitted evil, it is hard to conclude that Congress meant to bestow an unlimited one in a complex and debatable area as to which there had been no complaint." *McFaddin Express, Inc.* v. *Adley Corp.*, — F2d —, ———— (2d Cir. 1966).

III

The complaint does not assert a claim requiring construction of the Interstate Commerce Act and state law governs the claims.

The claims of the petitioners arise under state law even though the contracts required ICC approval to be carried out. In this regard the District Court of Connecticut in the first action, *McFaddin Express, Inc. v. Adley Corp.*, 240 F. Supp. 791 794-95, said:

> ". . . In all of its essential features the case made by the plaintiffs' complaint is based upon contracts negotiated at arms length in the open market, and they owed nothing to federal legislation. Every question which is raised depends for decision upon conventional local or general common law concepts and doctrines of damages applicable in suits to enforce purely private rights. In construing the contracts, it might be found expedient or even necessary to refer to or consult the statutes upon which the applications to the ICC for permission to merge and to temporarily operate McFaddin were based, which are referred to in the complaint, and with some reference to which the contracts appear to have been executed. But, as stated in *St. Paul, M. & M. Ry.* v. *St. Paul & No. Pac. R. R.*, 68 Fed. 2, 13 (8th Cir. 1895), aff'd by consent, 18 S. Ct. 946, 42 L.Ed. 1212 (1897), where a similar issue of federal question jurisdiction was decided adversely to the plaintiff—
>
> '[A]fter all, the point at issue upon this

> branch of the case is the true construction of that agreement, and that is clearly a question of general and local law, inasmuch as the right asserted by the plaintiff depends upon that agreement, and the local statute by which it was adopted and confirmed. A case does not become one of federal cognizance because it may be found necessary, in construing a private contract or a local law from which the rights of the respective parties are derived, to consult some federal statute with a view of ascertaining the meaning of the contract or the scope and effect of the local law. In such cases the cause of action or the defense, as the case may be, is not founded on a law of the United States in any such sense as to bring the suit within the jurisdiction of the federal courts'."

As Judge Friendly phrased it for the Second Circuit:

> ". . . we cannot find that plaintiffs have here shown that federal principles should supersede state law in any respect relevant to this case. That the contracts could not lawfully be carried out save with ICC approval does not, without more, demonstrate that Congress meant all aspects of their performance or non-performance to be governed by law to be fashioned by federal courts rather than by the state law applicable to similar contracts relating to businesses not under federal regulation." 346 F. 2d 424, 427 (2d Cir. 1965).

The opinion of the Second Circuit cited its recent decision of *T. B. Harms Co.* v. *Eliscu,* 339 F. 2d 823. The facts of that case showed that there had been assignments of rights in renewal copyrights and the

purported sole owner had recorded an instrument in the Copyright Office purporting to be an assignment of renewal copyrights. There was no diversity of citizenship. Citing a long line of Supreme Court cases, the opinion held that the critical issue involved was whether the defendant-assignor had made a prior assignment. The real question was the title to the copyrights. In deciding that this was a question of local law, the opinion said:

> "To take one of many examples, the Court said in *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U.S. 473 . . .:
>
> > 'The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy. For courts of a state may try questions of title, and may construe and enforce contracts relating to patents. *Wade* v. *Lawder,* 165 U.S. 624, 627, 41 L.Ed. 852, 17 Sup. Ct. Rep. 425.'
>
> "Just as with western land titles, the federal grant of a patent or copyright has not been thought to infuse with any national interest a dispute as to ownership or contractual enforcement turning on the facts or on ordinary principles of contract law." 339 F. 2d at 826.

Pan Am. Corp. v. *Superior Court,* 366 U.S. 656—A natural gas pipeline company had a contract with two natural gas producers for transportation in interstate commerce. The Kansas Corporation Commission ordered it to pay a higher price for the gas than was stipulated in the contract. It paid the higher price under protest; it challenged the validity of the

order and the order was later held invalid. It then sued in the Superior Court of Delaware to recover the overpayments, claiming alleged contracts to refund the overpayments in the event that the order should be held invalid, and also claiming restitution of the overpayments on the ground of unjust enrichment.

The producers claimed that the state court lacked jurisdiction because under the Natural Gas Act the prices to be paid must be in accordance with the rates filed with the Federal Power Commission. The producers petitioned the Supreme Court of Delaware for a writ of prohibition to prevent further proceedings before the Superior Court. The petition was denied. The Supreme Court of the United States affirmed,[3] with Justice Frankfurter writing for a unanimous court. The following appears in 366 U.S. at 662-665:

> "But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25, the complaints in the Delaware Superior Court determine the nature of the suits before it. Their operative paragraphs demand recovery on alleged contracts to refund overpayments in the event of a judicial finding that the Kansas minimum-rate order was invalid, or for restitution of the overpayments by which petitioners have

allegedly been unjustly enriched under the compulsion of the invalid Kansas order. No right is asserted under the Natural Gas Act.

"The suits are thus based upon claims of right arising under state, not federal law. It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law. See, *e.g., Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667, 672, and cases cited. Apart from diversity jurisdiction, 'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .' *Gully* v. *First National Bank,* 299 U.S. 109, 112-113. . . .

"The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. What was said in *Gully* v. *First National Bank,* 299 U.S., at 116, is apposite:

> 'We recur to the test announced in *Puerto Rico* v. *Russell & Co., supra*: "The federal nature of the right to be established is decisive—not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source

of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co.* v. *Mottley, supra.* With no greater reason can it be said to arise thereunder because permitted thereby.'

"We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive.

"Nor does § 22 of the Natural Gas Act help petitioners. 'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded. This was settled long ago in *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U.S. 255, a case involving a grant of exclusive jurisdiction to the federal courts in all cases arising under the patent laws. Suit was brought in a state court on a common-law contract claim. The complaint contained no mention of a patent, but the invalidity of certain patents was set up in defense. In response to the argument that this deprived the state courts of jurisdiction, the Court said:

'Section 711 [the jurisdictional provision]

does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *"cases"* arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.' (Emphasis in the original.) 168 U.S., at 259.

"Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."

Respondents contend that the complaint does not assert a claim requiring construction of the Interstate Commerce Act in any way material to this case and therefore there is no jurisdiction under either 28 U.S.C. §1331(a) or under 28 U.S.C. §1337. As pointed out by the court below:

"Nothing in the complaint indicates that determination whether it [Adley] breached this agreement will require construction of the Interstate

Commerce Act. Contrast *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950)" *McFaddin Express, Inc.* v. *Adley Corp.*, — F. 2d —, ——— (2d Cir. 1966).

The Second Circuit's first opinion pointed out that "'implication' of a federal remedy is hardly automatic, particularly where an agency occupies the field." *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F. 2d 424, 426 (2d Cir. 1965). In this case the ICC noted: "it is well established by Commission precedent that matters of controversy arising between the parties under private contracts must be left for settlement by the parties themselves or the courts." 87 M.C.C. at 667. On the prior petition for certiorari, No. 492, October Term, 1965, the Solicitor General was asked to express the views of the United States. *McFaddin Express, Inc.* v. *Adley Corp.*, 382 U.S. 912. In his memorandum (p. 5) he stated: "On the other hand, the problem appears not to be one of great frequency or importance, and the government agency most directly concerned—the Interstate Commerce Commission—does not believe that the result reached by the court below is demonstrably unsound or that review by this court is warranted. In denying approval of the proposed consolidation here, the Commission indicated its view that disputes over temporary control under § 310a (b) ordinarily do not involve questions of importance from the standpoint of national transportation policy, and therefore are more appropriately left to private adjustment under local law. . . . Accordingly, the Commision perceives no need to recognize a federal cause of action, at least where (as in the present case) the Commission's §310a (b) order does not in terms command obedience

to, albeit it predicates Commission approval upon, the terms and conditions of the management agreement."

Thus, the correct decision of the merits in this case does not depend on the construction of the Interstate Commerce Act, but rather on state law, *State Automobile Ins. Ass'n* v. *Parry,* 123 F. 2d 243, 246 (8th Cir. 1941), and therefore the claimed right will neither be supported by one construction of the Act nor defeated by another construction of the Act. Cf. *Wheeldin* v. *Wheeler,* 373 U.S. 647.

IV

Res judicata prevents re-litigation of the claim that 49 U.S.C. § 310a was violated and therefore no claim of a violation of 49 U.S.C. § 5 resulting from violation of § 310a can be entertained.

The first decision of the Second Circuit adjudged that there was no violation of 49 U.S.C. § 310a. The petitioner still persists in claiming that 49 U.S.C. § 5 was violated because § 310a was violated. He is foreclosed under principles of res judicata from now claiming the same § 310a violation and thus he is foreclosed from claiming a § 5 violation on this predicate.

Despite the final adjudication of the § 310a question in the first opinion of the Second Circuit, the petitioners' "questions presented" numbers 3 and 5 persist in seeking to again raise this point for review. Actually the petitioners' question 1 raises the same point since it admits that their claim of violation of

49 U.S.C. § 5 presupposes a violation of the temporary control order of the ICC under 49 U.S.C. § 310a. In questions 2 and 4, the petitioners raise the point of a § 5 violation but each time omit the salient premise that their claim is founded upon the violation of the § 310a order.

Thus, no matter how tortuously the petitioners strive to evade the issue, they cannot ignore the basic premise that all their grounds are bottomed on a claimed violation of 49 U.S.C. § 310a as to which the Second Circuit spoke finally when it stated flatly that Adley "has disobeyed no express command of the ICC." *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965). As a matter of fact the petitioners in their petition for writ of certiorari (p. 7), admit that the prior action based federal jurisdiction on the violation of the temporary control order under 49 U.S.C. § 310a. This prior action is now a final judgment. Contrary to the petitioners' contention in their petition (p. 9), it is not "conceded" that Adley violated the § 310a order thereby bringing it within the prohibition of 49 U.S.C. § 5. In fact, as pointed out above, the first decision of the Second Circuit specifically held that Adley did not violate any command of the ICC. This question, respondents contend, cannot now be relitigated. The salutary doctrine of res judicata prevents it.

The doctrine of res judicata ". . . prevents relitigation of all grounds for, or defenses to, recovery that were then available to the parties before the particular court rendering the judgment in relation to the same claim—regardless of whether all grounds for recovery or defenses were judicially determined." 1B *Moore's*

Federal Practice, Para. 0.405 [1], at 622 (2d ed. 1965). As Professor Moore indicates, the doctrine of res judicata applies to questions of federal jurisdiction as well as a judgment on the merits:

> "As previously pointed out a valid final judgment on the merits is res judicata as to the cause of action involved, and operates as collateral estoppel on relevant and material issues then decided. But the underlying policy of res judicata is not restricted to a valid judgment that deals solely with the merits; it extends to and includes matters in abatement, such as jurisdiction of the subject matter, federal jurisdiction, jurisdiction over the res, jurisdiction over the defendant, venue, and related matters.
>
> "In *American Surety Co.* v. *Baldwin,* [287 U.S. 156, 166] Mr. Justice Brandeis stated:
>
> > 'the principles of *res judicata* apply to questions of jurisdiction as well as to other issues.' "

1B *Moore's Federal Practice* Para. 0.405 [5], at 655 (2d ed. 1965) (footnotes omitted).

This court in *Jackson* v. *Irving Trust Co.,* 311 U.S. 494, firmly established that the doctrine applies to the issue of jurisdiction. In that case, a judgment had been obtained against the alien property custodian and had not been appealed. The district court had jurisdiction if the plaintiff was not an "enemy" alien. Years later, the government moved on affidavits to set aside the decree, alleging that the court had been without jurisdiction to entertain the action as the plaintiff was an "enemy" alien. The government's motion was granted by the District Court but the

Circuit Court of Appeals reversed and reinstated the original decree. On review this Court affirmed the action of the Circuit Court of Appeals and held that this determination was finally adjudicated, stating, "and whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree." 311 U.S. at 503. This Court pointed out that if the original judgment which necessarily determined jurisdiction had been erroneous the only remedy was by way of appeal.

In *Hicks* v. *Holland,* 235 F.2d 183 (6th Cir. 1956), certiorari denied, 352 U.S. 855, the Circuit Court affirmed the decision of the district judge who dismissed the complaint *sua sponte.* The records of the United States District Court showed that a complaint covering the same subject matter and parties had been dismissed by one of the judges of that court for lack of jurisdiction and, therefore, the prior dismissal on jurisdictional grounds brought this action within the principle of res judicata.

In *Ripperger* v. *A. C. Allyn & Co.,* 113 F. 2d 332, (2d Cir. 1940), certiorari denied, 311 U.S. 695, a case involving federal venue, the court stated:

> "No reason is apparent why the rule should be less applicable to a decision denying jurisdiction than to one sustaining it," 113 F. 2d at 333.

The respondents claim that the jurisdictional issue, that is, "the non-merits judgment", is final as to the lack of federal jurisdiction. The determination of the jurisdictional question in the prior suit is conclusive because there was full opportunity to litigate all as-

pects of that question. As this Court stated in *Heiser* v. *Woodruff*, 327 U.S. 726:

> "In general a judgment is *res judicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit." 327 U. S. at 735.

It is abundantly clear that the alleged violation of 49 U.S.C. § 310a was raised and litigated in the first action. And, under the circumstances of this case as pointed out above, a claimed violation of 49 U.S.C. § 5 is necessarily predicated upon a violation of 49 U.S.C. § 310a. The allegation of a § 5 violation is not new to the instant action for in their petition for writ of certiorari in the first case (pp. 14-15), *McFaddin Express, Inc.* v. *Adley Corp.*, 382 U.S. 1026, petitioners stated that the allegations of the complaint in that case "clearly" suggested a § 5 violation and that the Second Circuit "erred in excluding consideration of this factor. . . ." It is without question that the grounds upon which petitioners have predicated federal jurisdiction were raised in the earlier case, although the alleged violation of 49 U.S.C. § 5 was not decided therein.

As Professor Moore points out:

> "The doctrine of res judicata is not a technical rule, but a rule of fundamental repose for both society and litigants. Its salutary principle 'is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case,

> is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court.' The doctrine prevents an encore and 'reflects the refusal of law to tolerate needless litigation.' And subsequent litigation is needless if, by fair process, a party over whom the court had jurisdiction raised or had an opportunity to raise issues that were a part of the cause of action previously dealt with."

1B *Moore's Federal Practice* Para. 0.405 [1], at 628 (2d ed. 1965). (footnotes omitted.)

The doctrine does no injustice. It is based upon common sense. Otherwise, the petitioners could keep themselves in the United States District Court forever by bringing successive actions, in each of which they might allege that the identical facts are a violation of some other federal statute or a violation of another pre-existing ICC order. The petitioners have a proper forum for their contract claims in the Superior Court of Connecticut, where their suit is pending. The adverse determination of their claim of federal question jurisdiction does not foreclose a hearing on the merits in a court which does have jurisdiction of the controversy, if that is what they truly seek.

V

An allegation by one motor carrier of a violation of 49 U.S.C. § 5 by another motor carrier does not furnish the basis of Federal Question Jurisdiction.

Contrary to the petitioners' claim that the Second Circuit in the majority opinion took the position that Adley violated 49 U.S.C. § 5 (petition p. 10), that court did not find that 49 U.S.C. § 5 was violated. It held that "no private right of action against a motor carrier for violation of § 5 (4) exists." *McFaddin Express, Inc.* v. *Adley Corp.*, — F.2d —, ——— (2d Cir. 1966). The petitioners also claim that Judge Lumbard in the concurring opinion found that 49 U.S.C. § 5 conferred a private right of action "here". (petition p. 11) Such is not the case. It is clear that Judge Lumbard held that a private right of action is predicated upon finding a violation of 49 U.S.C. § 310a. The first decision of the Second Circuit held that § 310a had not been violated, and Judge Lumbard held below that "the ICC granted an exemption from § 5 pursuant to § 310a" and he did not find "any statutory private right of action for such a suit." Id. at ——. Thus, how could he have found that 49 U.S.C. § 5 conferred a private right of action "here"?

The argument that the provisions of 49 U.S.C. §§ 8 and 9 apply here to confer a private right of action in favor of a motor carrier under the circumstances of this case must fail for the reasons set out in the majority opinion below. It should be noted *in limine* that §§ 8 and 9 of Part I of the Interstate Commerce

Act are not included within Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301-327, the Motor Carrier Act.

As Judge Friendly held below, the

> ". . . inclusion of motor carriers in § 5 [was] part of the 1940 legislation establishing a National Transportation Policy, 54 Stat. 899, and adopting Part III of the Interstate Commerce Act relating to water carriers. The desire of the draftsmen to have a single comprehensive provision relating to consolidation of all three forms of transportation rather than being obliged to frame separate sections for each Part of the Interstate Commerce Act *would not suggest any legislative purpose to provide a private remedy for unlawful control by a motor carrier that had previously been withheld.* . . . Indeed, in view of the legislative concern over too much competition in the motor carrier industry and the need for effective limitations, . . . it would have been a strange reading to say that by the 1940 amendment Congress provided a private right of action for unlawful combination although it refused in 1949 and again in 1957, see *T.I.M.E. Inc., supra*, 359 U.S. at 471-73, to provide one against unlicensed operation or to give shippers by motor carrier a cause of action for unreasonable or discriminatory rates. (emphasis added)

The opinion goes on to discuss the 1965 amendments to the Motor Carrier Act, *supra* p. , and concluded by holding that:

> "On the other hand, if, as we think clear, no

> private right of action for violation of § 5 (4) by a motor carrier existed prior to 1965, we ought not to assume a desire to change this in the absence of some indication of Congressional intent, and neither the language of the 1965 amendment nor the legislative history affords this. . . .
>
> With the legislature so cautious in granting a limited private right of action against an admitted evil, it is hard to conclude that Congress meant to bestow an unlimited one in a complex and debatable area as to which there had been no complaint. Pending further explication of legislative purpose, it thus seems best to continue to read §§ 8 and 9 in a manner which accords equally well with the language, namely, that *these sections concern only violations of Chapter 1 by carriers generally subject to its provisions, to wit, those, primarily railroads, to which § 1 (1) says 'the provisions of this chapter shall apply.' Hence, in the absence of provision in Title II, no private right of action against a motor carrier for violation of § 5 (4) exists.*"

McFaddin Express, Inc. v. *Adley Corp.*, — F.2d —, ——— (2d Cir. 1966). (emphasis added).

In *Riss & Co.* v. *Association of American Railroads*, 178 F. Supp. 438 (D.D.C. 1959) in answer to allegations of competitive injury resulting from unlawful control of one motor carrier by another in violation of 49 U.S.C. § 5 (4) the court held:

> "that these counterclaims do not state a claim upon which relief may be granted. . . . Defendants cite no case in which an action for damages

alleging injury as a result of a violation of Section 5 (4) by a motor carrier has been brought, either under the Interstate Commerce Act or at common law. As in the case of the counterclaims alleging injury as a result of operation in excess of authority, the court holds that *to allow a common-law action for damages for violation of Section 5 (4) by a Motor Carrier would be contrary to the intent of Congress.*" (emphasis added) 178 F. Supp. at 446.

From the foregoing it is clear that Congress has not provided a private right of action in damages for the alleged unlawful control of one motor carrier by another, and petitioners should be left to pursue their pending breach of contract action in the Connecticut court.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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